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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

vs.

TIMOTHY CONDON,
Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether compliance with the common law knock and announce rule in the execution of a search warrant is required for the search to meet standards of constitutional reasonableness.

2. If compliance with the knock and announce rule is required by the Fourth Amendment, whether the combination of weapons, electronic surveillance equipment, and easily disposable contraband creates an exigency which excuses the failure to announce.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Illinois, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Illinois.

OPINION BELOW

The Supreme Court of Illinois issued its opinion in this case on March 12, 1992. The opinion is reported at 148 Ill.2d 96, 592 N.E.2d 951, 170 Ill.Dec. 271. In its decision, the court determined that compliance with the knock

and announce rule was an important consideration in determining the constitutional reasonableness of a search or arrest. The majority, over a vigorous dissent from the Chief Justice, then held that the combination of drugs, weapons, and surveillance equipment did not constitute exigent circumstances, and so did not excuse the failure of the officers to comply with the rule. The majority thus concluded that the trial court had erred in denying the defendant's motion to suppress evidence.

The Supreme Court of Illinois accordingly affirmed the decision of the Illinois Appellate Court, which had reversed the trial court's order denying defendant's motion to suppress evidence. The Appellate Court's opinion is reported at 195 Ill.App.3d 815, 552 N.E.2d 413, 142 Ill. Dec. 63. Copies of both the Illinois Appellate Court and Supreme Court of Illinois opinions are included in the appendix to this Petition.

JURISDICTION OF THE COURT

The opinion of the Supreme Court of Illinois, affirming the decision of the Appellate Court of Illinois and reversing the order of the Circuit Court, was issued on March 12, 1992. The People of the State of Illinois timely petitioned the Supreme Court of Illinois for rehearing, which was denied on June 1, 1992. This Petition is filed within ninety days of that order.

This Court's jurisdiction is invoked under 28 U.S.C §1257(3), since in the proceedings in the state courts of Illinois the respondent has asserted an alleged violation of his rights arising under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV provides that:

> The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV provides, in pertinent part, that:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The defendant, Timothy Condon, was indicted in the Circuit Court of DuPage County, Illinois, on one count of armed violence, *Ill.Rev.Stat.*1987, ch. 38, §33A-2, one count of unlawful delivery of more than 15 grams of a substance containing cocaine, *Ill.Rev.Stat.*1987, ch. 56½, §1401(a)(2), one count of unlawful possession with the intent to deliver more than 15 grams of a substance con-

taining cocaine, *Ill.Rev.Stat.*1987, ch. 56½, §1401(a)(2), one count of unlawful possession with the intent to deliver more than 30 grams but not more than 500 grams of a substance containing cannabis, *Ill.Rev.Stat.*1987, ch. 56½, §705(d), one count of conspiracy to deliver 15 grams or more of a substance containing cocaine, *Ill.Rev.Stat.*1987, ch. 56½, §1405(a), one count of narcotics racketeering, *Ill. Rev.Stat.*1987, ch. 56½, §1654(a), and one count of unlawful delivery of 30 grams or more of a substance containing cocaine, *Ill.Rev.Stat.* 1987, ch. 56½, §1401(a)(2). (C. 14-19, 39-40, 305). Following a bench trial, defendant was found guilty of the first four counts and not guilty of the latter three. (C. 1334). He was sentenced to 12 years' imprisonment on the armed violence conviction, 12 years' imprisonment on the possession with intent to deliver cocaine conviction, 12 years' imprisonment on the delivery of cocaine conviction, and 3 years' imprisonment on the possession with intent to deliver marijuana conviction, with all sentences to run concurrently. (C. 1396-1397).

On November 6, 1987, at approximately 6:45 p.m., agents of the DuPage County Metropolitan Enforcement Group (DuMEG) executed a search warrant on a residence located at 1 N. 535 Swift Road, Lombard, Illinois. Defendant and his fiancee resided at that address, a house owned by defendant's brother, Bernard J. Condon. (C. 612-613). Bernard Condon was a co-defendant with defendant, but was a fugitive at the time of defendant's trial.

The complaint for search warrant, prepared by DuMEG Agent Barbara Durnil, stated that co-defendant Bernard Condon had charges pending from his 1985 arrest, when he was found carrying 41.53 grams of cocaine and a loaded .22 caliber Baretta semi-automatic pistol. (C. 62). Also per the complaint, Agent Charles Dvorak was informed by Roger Trenton that Trenton had purchased cocaine on

several occasions from Bernard Condon and defendant at the 1 N. 535 Swift Road residence. Trenton also told Dvorak that defendant and his brother would distribute cocaine at the residence between 6 p.m. and 9 p.m. According to Trenton, there were two closed circuit television cameras and a police scanner to monitor traffic near the residence, and there were several weapons located in the residence to protect the cocaine and currency. (C. 62).

The complaint further stated that on June 10, 1987, Dvorak completed a purchase of cocaine by sending Trenton into the residence, where he purchased cocaine from defendant. Trenton told Dvorak that the sale occurred in the second floor office of the residence. According to Dvorak, while at defendant's residence on June 10, 1987, he observed two surveillance cameras, one at the front door and one at the rear door. Dvorak also observed a police radio scanner on the kitchen counter as he was sitting in his vehicle in the driveway. (C. 63).

The complaint for search warrant also stated that an individual named Ben Adams, who sold cocaine to Agent Durnil, had indicated that his source was located at 1 N. 535 Swift Road, defendant's residence. (C. 63-64).

At the hearing on defendant's motion to suppress evidence, defendant testified that he was in the kitchen at the time the police executed the warrant. According to defendant, the police did not knock, use the doorbell, or announce themselves. (C. 607). Defendant heard two loud bangs, and at least a dozen police officers, who defendant described as S.W.A.T. officers, forcibly entered the house. (C. 608).

Defendant admitted in cross-examination that there were surveillance cameras at both the front and back doors of the house and a monitor in the kitchen capable

of switching from one camera to the other. According to defendant, the surveillance cameras were on at the time the police entered his home, but it was too dark to see anything. There was also a police scanner, but defendant claimed that it was not on. (C. 609-610). Defendant further admitted that he had 13 guns in the house, including a loaded revolver in his bedroom. He said most of the guns were shotguns which he used for hunting. (C. 610, 615-616).

The State only offered the complaint for search warrant at the suppression hearing. (C. 622). The trial court denied defendant's motion to suppress, finding that exigent circumstances were present which justified the officers' failure to knock and announce prior to entering the home. (C. 635-636).

At trial, Officer Michael Sullivan testified that on November 6, 1987, while conducting surveillance on the defendant's residence, he observed Agent Durnil and Ben Adams arrive at the residence. Adams exited the vehicle, entered the residence, exited the residence, and reentered Durnil's vehicle. Durnil then drove away, and Sullivan was advised by radio shortly thereafter that Adams was arrested with cocaine in his possession. (C. 753-755). He then observed the team of officers execute the search warrant of defendant's premises. They wore bullet proof vests, had special weapons, and used a ram and access equipment. (C. 756).

Ben Adams testified that he went with Durnil to the house on November 6, 1987, to purchase an ounce of cocaine. He met defendant and gave him $1,900 in prerecorded money. (C. 1123-1125). Defendant counted the money, and his brother, Bernard Condon, went upstairs. About 5 to 10 minutes later, defendant's brother returned to the kitchen

and handed what Adams assumed to be an ounce of cocaine to defendant. Defendant in turn placed the substance on the counter and said "[t]here you go." (C. 1125-1126). The substance was later determined by laboratory analysis to contain cocaine. Defendant placed the $1,900 in his front pocket after counting it. (C. 1128). At the time of defendant's arrest in the kitchen, the prerecorded money was found on the floor near defendant. (C. 764-765). A search of the house revealed cocaine and marijuana in the second floor office. (C. 770-773).

In addition to the controlled substances, the second floor office also contained the title to defendant's car, and bills and receipts in defendant's name. (C. 816-817, 826-830). Computer records found in the office were shown to contain the fingerprints of defendant and of Bernard Condon. (C. 1092). There was also a loaded .30 semi-automatic pistol in the desk drawer of the office. (C. 777).

Karen Schaeffer, defendant's fiancee, testified on his behalf. She said that she had lived with defendant at the 1 N. 535 Swift Road residence for about three months prior to the execution of the warrant, but that Bernard Condon owned the house. (C. 1314-1315, 1324). According to Schaeffer, there were four bedrooms upstairs, one of which was Bernard Condon's office. She said the office was kept locked all the time. (C. 1315-1316). Schaeffer testified that Bernard Condon had the only key to the door and to the lockbox which contained the cocaine, and that defendant did not have a key to either the office or the lockbox. (C. 1316). On cross, Schaeffer admitted that she had never tried defendant's keys to see if they opened the lock box, (C. 1324), but she said she had never seen defendant open the office or the safe, and that Bernard was the only person to open the door to the office. (C. 1326).

After the close of evidence, the trial court entered the convictions and sentences. (C. 1396-1397). The defendant timely appealed, and the Appellate Court of Illinois, Second Judicial District, reversed and remanded for new trial on the possession and delivery charges, and reversed the armed violence conviction. The Appellate Court denied the People's petition for rehearing, and the People sought leave to appeal to the Supreme Court of Illinois.

The Supreme Court of Illinois affirmed the Appellate Court decision on March 12, 1992, the majority finding that no exigent circumstances existed which would justify the police officers' failure to knock and announce when executing the search warrant. The People's petition for rehearing was denied on June 1, 1992, and the People now timely petition this Court for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE KNOCK AND ANNOUNCE RULE SHOULD NOT BE VIEWED AS A CONSTITUTIONAL REQUIREMENT IN ASSESSING THE REASONABLENESS OF A SEARCH CONDUCTED PURSUANT TO A SEARCH WARRANT.

In this case, police officers executed a warrant to search a house for a controlled substance. They reasonably expected to find cocaine and various weapons on premises protected by surveillance equipment which they knew included video cameras, a monitor, and a police scanner. Because these factors provided both a significant danger to the safety of the officers, and a concern for the destruction of the evidence, the police forcibly entered the residence without knocking and announcing.

In denying defendant's motion to suppress evidence seized during the search, the trial court found exigent circumstances sufficient to excuse the officers' failure to announce their presence and purpose. In making its finding, the court focused on the officers' strong reason to believe that defendant was on the premises, the nature of the object to be seized, and the possibility of defendant's escape. The trial court further considered the evidence that the co-defendant had been arrested earlier for similar offenses, and had been armed at the time. (C. 635-636).

On appeal, both the Appellate Court of Illinois, Second District, and the Supreme Court of Illinois held that the trial court had erred in finding exigent circumstances sufficient to excuse the failure to knock and announce. *People* v. *Condon*, 148 Ill.2d 96, 592 N.E.2d 951, 170 Ill.Dec. 271 (1992); 195 Ill. App.3d 815, 552 N.E.2d 413, 142 Ill. Dec. 63 (2nd Dist. 1990).

In the Supreme Court of Illinois, both the majority and the dissent appear to presuppose that compliance with the knock and announce rule is a necessary component in assessing the reasonableness of a search conducted pursuant to a search warrant. *Condon*, *supra*, 592 N.E.2d at 954, 959. Petitioner disagrees, however, because constitutional reasonableness must be determined on a case by case basis, and reliance on the mechanistic application of an archaic common law rule adds little to this analysis. Indeed, this case clearly demonstrates the damage that can be done with such mechanical application. This prosecution was the culmination of a four month investigation of defendant and his brother, co-defendant Bernard Condon, and the interests of justice are not served by its loss.

Petitioner acknowledges, however, that the knock and announce rule has shown remarkable vitality. Although this Court has never explicitly held that compliance with

the rule of announcement is required by the Fourth Amendment for the reasonable execution of a search warrant, the majority of jurisdictions has adopted it through either statute or common law. Mericli, *The Apprehension of Peril Exception to the Knock and Announce Rule*, 16 Search and Seizure L. Rep. 129, 131, 134 (1989). Representative is the recent opinion of the Supreme Court of Wisconsin, *State* v. *Williams*, ___ Wis.2d ___, 485 N.W.2d 42 (No. 90-1459-CR, June 17, 1992). The *Williams* court clearly starts with the presumption that the Fourth Amendment contains a notice requirement. *Williams*, 485 N.W.2d at 46. Commentators discussing the development of the rule also presume that the announcement requirement carries a constitutional dimension. See., e.g., 2 W. LaFave, *Search and Seizure*, §4.8(a), 272 (2d ed., 1987). Petitioner must challenge this presumption.

The Supreme Court of Illinois placed the common law announcement requirement within the context of the constitution in *People* v. *Wolgemuth*, 69 Ill.2d 154, 370 N.E.2d 1067, 13 Ill.Dec. 40 (1977). In *Wolgemuth*, the court considered decisions of this Court which were decided based on federal and state statutes. *Wolgemuth*, 370 N.E.2d at 1071-1072, discussing *Sabbath* v. *United States*, 391 U.S. 585, 88 S.Ct. 1755 (1968); *Ker* v. *California*, 374 U.S. 23, 83 S.Ct. 1623 (1963); and *Miller* v. *United States*, 357 U.S. 301, 78 S.Ct. 1190 (1958). Based on its consideration of these cases, the *Wolgemuth* court wrote: ". . . Although the mere failure of police to announce their authority and purpose does not *per se* violate the Constitution, it may influence whether subsequent entry to arrest or search is constitutionally reasonable." 370 N.E.2d at 1072-1073.

The Supreme Court of Illinois took this reasoning a step further in *People* v. *Ouellette*, 78 Ill.2d 511, 401 N.E.2d 507, 36 Ill.Dec. 666 (1979). Based on the holding in *Wolgemuth*, the court reasoned that, ". . . where exigent circumstances exist, the failure of police to knock and announce their authority and purpose in the execution of a search warrant for narcotics does not violate the fourth amendment right against unreasonable searches and seizures." *Ouellette*, 401 N.E.2d at 509. In these two cases, the Supreme Court of Illinois thus elevated a common law rule to a constitutional standard.

Petitioner recognizes, of course, that all searches must be evaluated within the standards of the Fourth Amendment, as applied to the states through the Fourteenth Amendment. *Ker*, *supra*, 374 U.S. at 33-34. While petitioner challenges the constitutional necessity of the announcement requirement, petitioner does not dispute the absolute necessity that all searches must be conducted reasonably. Petitioner further asserts, however, that searches conducted pursuant to a warrant are more reasonable from the outset, because a neutral magistrate has already made a probable cause determination.

A significant problem with the evolution of the knock and announce rule is that the main case which provides the historical and analytical framework in fact dealt with a warrantless entry. *Ker* v. *California*, *supra*, presents an equally divided Court attempting to draw the line at what circumstances will excuse the notice requirement for a warrantless entry to arrest a suspect and to seize evidence. However, Illinois and other jurisdictions following *Ker* do not seem to draw an adequate distinction between warrantless entries and those searches based on the execution of a search warrant. (See LaFave, *supra*, §4.8(a) at 271: ". . . it has generally been assumed . . . that *Ker* is also applicable to search warrants.") This lack of distinction between two very different situations should cause concern regarding the evolution of this rule. To place war-

rantless entries on the same footing as entries conducted pursuant to a warrant renders the magistrate's involvement almost superfluous. Further, viewing these situations in the same light would seem to contravene this Court's holding requiring a warrant for an arrest in the home, absent exigent circumstances. *Payton* v. *New York*, 445 U.S. 573, 100 S.Ct. 1371 (1980). The clear message of *Payton* is that these situations are distinct, and that the warrant requirement ". . . minimizes the danger of needless intrusions . . ." into the home. *Payton*, 445 U.S. at 585-586.

In discussing *Payton*, however, petitioner must acknowledge that even Justice White's well-reasoned dissent expresses a clear preference for the notice requirement: "These four restrictions on home arrests—felony, knock and announce, daytime, and stringent probable cause—constitute powerful and complementary protections for the privacy interests associated with the home." 455 U.S. at 616 (White, J., dissenting). However, subsequent language in the dissent demonstrates the real distinction between a warrantless arrest and a search conducted pursuant to a warrant: "And these requirements allow the arrestee to surrender at his front door, thereby maintaining his dignity and preventing the officers from entering other rooms of the dwelling." *Id.* at 617. In the execution of a search warrant, officers will most certainly be entering other rooms of a suspect's residence, because a neutral magistrate has already found probable cause to believe that evidence of criminal activity is present. Yet this very important distinction seems to have been lost in the evolution of the rule.

Although the evolution of the common law rule primarily focuses on privacy, the petitioner questions the nature of the privacy interest once a neutral and detached magis-

trate has found probable cause to authorize a search. The venerable and oft cited *Semayne's Case* dealt with the execution of a civil writ, not with a warrant to search for evidence of a felony. *Mericli*, *supra*, at 131-132. See also *Payton*, *supra*, 445 U.S. at 604-605 (White, J., dissenting); *Ker*, *supra*, 374 U.S. at 47 (Brennan, J., dissenting). Further, all the common law antecedents of the rule came about before the age of electronic surveillance and automatic weapons. The increased peril officers face in executing certain warrants, especially in the often violent drug trade, should be enough to encourage serious reconsideration of the apparent acceptance of the knock and announce rule as an actual requirement of constitutional reasonableness. See *Mericli*, *supra*, at 129-131.

Petitioner again asserts that it does not intend to erode the reasonableness requirement of the Fourth Amendment. However, petitioner does request this Court to halt the elevation of a common law anachronism to constitutional status. As this Court has written, ". . . it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant—subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.'" *Dalia* v. *United States*, 441 U.S. 238, 257, 99 S.Ct. 1682 (1979). Based on the information known to the officers at the time, the manner of execution of this warrant was constitutionally reasonable. To the extent that the Supreme Court of Illinois found otherwise based on the common law rule of announcement, that rule requires serious re-evaluation. Further, this result cannot be defended as a matter of state law, because the Supreme Court of Illinois has held that the protection afforded by our state constitution is no more extensive than that provided by the federal con-

stitution. *People* v. *Tisler*, 103 Ill.2d 226, 469 N.E.2d 147, 155-157, 82 Ill.Dec. 613 (1984).

Petitioner requests that this Court grant certiorari to examine the evolution of the knock and announce rule in the context of searches conducted pursuant to a warrant, and further requests that the judgment of the Supreme Court of Illinois be reversed.

II.

EVEN IF COMPLIANCE WITH THE RULE IS REQUIRED BY THE FOURTH AMENDMENT, THE COMBINATION OF WEAPONS, ELECTRONIC SURVEILLANCE EQUIPMENT, AND EASILY DISPOSABLE CONTRABAND CREATED EXIGENT CIRCUMSTANCES WHICH EXCUSED THE FAILURE OF THE EXECUTING OFFICERS TO ANNOUNCE THEIR PRESENCE AND PURPOSE PRIOR TO FORCIBLY ENTERING THE RESIDENCE.

In the case at bar, the majority in the Supreme Court of Illinois agreed with the appellate court majority, and concluded that all evidence seized as a result of the search of defendant's residence should have been suppressed. The majority reached this conclusion because it did not find exigent circumstances sufficient to excuse the police officers' failure to knock and announce their authority and purpose prior to entering the defendants' dwelling. *People* v. *Condon*, 148 Ill.2d 96, 592 N.E.2d 951, 957, 170 Ill.Dec. 271 (1992). Petitioner must strongly disagree. Even if this Court should determine that compliance with the knock and announce rule is required for a search to be constitutionally reasonable, the specific combination of factors here present, and known to the officers, constituted exigent circumstances sufficient to excuse the officers' failure to announce their presence.

As the state supreme court majority noted, the failure to knock and announce is not a *per se* constitutional violation, but has been viewed as a consideration in assessing the overall reasonableness of a search. *Condon*, 592 N.E. 2d at 954. The reasonableness of a search is determined by an examination of the totality of the circumstances. *Id.* at 955.

Petitioner argued below and continues to maintain that the totality test, by its very language, requires a synergistic analysis. Though finding a "certain appeal" to this argument, the majority rejected it. *Condon*, 592 N.E.2d at 955. However, an analysis of the totality still requires a consideration of the individual factors as they interrelate. As Chief Justice Miller noted in his dissent, the circumstances should be examined as a whole, and no individual circumstance is required to provide the necessary exigency. *Condon*, 592 N.E.2d at 959-960 (Miller, C. J., dissenting).

This view is consistent with this Court's holding in *Illinois* v. *Gates*, 462 U.S. 213, 103 S.Ct. 2317 (1983), where this Court rejected an analysis based on specific tests of reliability for informants' tips in favor of a totality of the circumstances analysis. 462 U.S. at 230-233. As the *Gates* Court explained in that context, a deficiency in one factor can be compensated for where another factor is especially strong. *Id.* at 233. This view is also consistent with the holding in *Ker* v. *California*, 374 U.S. 23, 83 S.Ct. 1623 (1963), where this Court looked to the information known by the officers in determining that they had probable cause to believe that drugs would be present. 374 U.S. at 34-35. Yet the majority in the Supreme Court of Illinois viewed the individual facts in isolation, and thus diluted the impact of the circumstances actually faced by the officers. Petitioner reiterates that the factors here were serious. The combination of drugs, weapons, and surveillance should not be as easily shrugged off as this opinion implies.

The unique combination of factors here created an exigency which justified the officers' failure to knock and announce. The Supreme Court of Illinois has determined that exigent circumstances may include considerations such as the danger to the officers executing the warrant, the ease with which evidence may be destroyed, and the uselessness of announcement. *People* v. *Ouellette*, 78 Ill.2d 511, 401 N.E.2d 507, 510, 36 Ill.Dec. 666 (1979); *People* v. *Conner*, 78 Ill.2d 513, 401 N.E.2d 513, 36 Ill.Dec. 672 (1979). Here, there was significant danger to the officers, because the house was essentially an armed camp, and the co-defendant had armed violence charges pending. In addition, any announcement was arguably superfluous, since surveillance cameras were posted at both entrances to the house, and monitored from the inside. The entire area was illuminated by flood lights. Finally, the officers expected to find cocaine, which can be easily destroyed—especially when video cameras and a police scanner could provide advance warning. (C. 62-64).

The facts presented here are much stronger than those in *Ker*, *supra*. Yet in *Ker*, this Court wrote:

> Here justification for the officers' failure to give notice is uniquely present. In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief that he might well have been expecting the police. We therefore hold that in the particular circumstances of this case the officers' method of entry, sanctioned by the law of California, was not unreasonable under the standards of the Fourth Amendment as applied to the States through the Fourteenth Amendment. 374 U.S. at 40-41.

If the entry in *Ker* was not constitutionally unreasonable, despite the lack of a warrant, then the petitioner

cannot fathom how the entry at bar was unreasonable. This again leads to our argument from Point I, *supra*, that the execution of a search warrant is a situation clearly distinct from a warrantless entry.

The Supreme Court of Illinois discussed this distinction, in the context of an arrest warrant, in *People* v. *Wolgemuth*, 69 Ill.2d 154, 370 N.E.2d 1067, 13 Ill.Dec. 40 (1977). In considering this distinction, the court noted that the involvement of the neutral magistrate serves to relieve officers "engaged in the often competitive enterprise of ferreting out crime" from the responsibility of making detached decisions concerning a suspect's criminality. *Wolgemuth*, 370 N.E.2d at 1070, *citing United States* v. *Watson*, 423 U.S. 411, 96 S.Ct. 820 (1976); *Gerstein* v. *Pugh*, 420 U.S. 103, 95 S.Ct. 854 (1975); and *Johnson* v. *United States*, 333 U.S. 10, 68 S.Ct. 367 (1948).

Petitioner submits that this involvement of the neutral magistrate should also be a factor for consideration in a determination of the presence of exigent circumstances. That the police officers executing a search warrant generally have the discretion to determine the best way to proceed with the search, *Dalia* v. *United States*, 441 U.S. 238, 257, 99 S.Ct. 1682 (1979), surely owes much to the fact that the neutral magistrate has already found probable cause to believe that the search will produce evidence of criminality. Therefore, the circumstances which could excuse a warrantless entry such as the one at issue in *Ker* should be far more serious than those which would excuse forced entry to execute a search warrant. Yet the analysis of the Supreme Court of Illinois not only ignored the seriousness of the situation faced by the officers, it also ignored the involvement of the neutral magistrate in authorizing the search.

As we noted above, the state supreme court failed to view the circumstances as a whole. *Condon*, *supra*, 592 N.E.2d at 955. In considering the factors in isolation, the court first looked to the fact that defendant's brother, co-defendant Bernard Condon, had been arrested two years earlier, with cocaine and a loaded hand gun in his possession. The court was unmoved by this fact, however, because the search warrant did not indicate that Bernard Condon had been violent at the time of his earlier arrest. *Id.* The Court determined that the knock and announce requirement could only be excused if the officers believed that Bernard Condon would use a gun against them. *Id.* See also *People* v. *Dumas*, 9 Cal.3d 871, 512 P.2d 1208, 1213 (1973); 2 W. LaFave, *Search and Seizure*, §4.8(a), 284-286 (2nd ed. 1987).

This view is entirely too narrow, and disregards the real dangers faced by officers. As the Court of Appeals has noted, "it has uniformly been recognized that substantial dealers in narcotics possess firearms and that such weapons are as much tools of the trade as more commonly recognized drug paraphernalia." *United States* v. *Payne*, 805 F.2d 1062, 1065 (D.C. Cir. 1986), *quoted in* Mericli, *The Apprehension of Peril Exception to the Knock and Announce Rule*, 16 Search and Seizure L.Rep. 130 (1989). Despite the dangers inherent in this combination of weapons and drugs, the *Condon* court merely paid lip service to the peril actually faced by officers executing search warrants. *Condon*, 592 N.E.2d at 956-957.

The majority next considered the fact that the officers had reason to believe that narcotics were being sold from the residence to be searched. On this factor, the majority agreed with the appellate court majority that the presence of drugs is not an exigent circumstance in and of itself. To create an exigency, the court reasoned that

police must have particular reason to believe that the evidence will be destroyed. *Condon*, 592 N.E.2d at 955-956. Over and above the fact that drugs are inherently easy to destroy, the officers here did have reason to believe the drugs would be destroyed. The warrant was issued to search a large, six bedroom house. The officers had reason to expect several people to be present when they executed the warrant. Had the police knocked and announced first, it would have posed little difficulty for one of the occupants to run upstairs and destroy the cocaine while another occupant answered the police knock at the door.

This concern about the potential destruction of evidence was especially significant here, because of the sophisticated surveillance equipment employed by defendant. The majority disagreed with the assertion that the cameras and police scanner made any announcement useless, *Id.* at 956, but petitioner must again point out that the residence to be searched was a large, six bedroom house. Had the police first knocked and announced, defendant could have answered the door while his co-defendant disposed of the cocaine upstairs. Further, the opinion gives insupportable deference to "the unrebutted testimony of the defendant that the outside lights were not on and therefore nothing could be seen on the monitor." *Id.* This deference is insupportable for two reasons. First, the fact that the testimony was unrebutted does not make it credible. The trial court was the one to determine the credibility of the testimony, and the trial court denied defendant's motion to suppress. More important, the reasonableness of the search will be determined based on what the officers knew at the time. *Ker*, 374 U.S. at 35. There is no basis in the record for the majority's assertion that "police should have known that the cameras were ineffective without lighting." *Condon*, 592 N.E.2d at 956. The police knew

that the residence was protected by surveillance equipment. If for no other reason than safety, they had to assume that the equipment always worked. For all the police knew, the cameras could have been infrared, which require no additional lighting. At any rate, there is no record support for anything that the officers "should have known" beyond the information in the warrant application.

The most important circumstance here was the officers' knowledge that defendant kept weapons in the house to protect the cocaine and currency. However, the majority found the information in the warrant was "hardly conclusive that the weapons were to be used against the police." *Condon*, 592 N.E.2d at 956. Again, the majority takes too narrow a view of the situation faced by the officers who executed this warrant. The officers here were charged with executing this warrant in a manner which would preserve the evidence and preserve their own safety. Under the circumstances faced by these officers, the forcible entry of defendant's residence did comply with the Fourth Amendment's requirement of reasonableness.

A more reasonable and realistic analysis of this issue was recently provided by the Supreme Court of Wisconsin in *State* v. *Williams*, ___ Wis.2d ___, 485 N.W.2d 42 (No. 90-1459-CR, June 17, 1992). Though the *Williams* court started with the presumption that the notice requirement is tied to the Fourth Amendment, 485 N.W.2d at 46, the court ultimately found that exigent circumstances exist where a suspected drug dealer is in possession of both firearms and illegal drugs. 485 N.W.2d at 48. In reaching its conclusion, the *Williams* court seriously considered the violence and volatility of the drug trade. 485 N.W.2d at 46-48. The *Williams* court also re-examined the rationale of *Dumas*, *supra*. In *Dumas*, the California Supreme Court had concluded that compliance with the

knock and announce rule is all the more compelling when officers believe that a suspect possesses a firearm. *Dumas*, 512 P.2d at 1213, cited in *Williams*, 485 N.W.2d at 47. In rejecting this conclusion, the *Williams* court properly focused on the changing nature of crime in the 1990's, and the increased violence associated with the illegal drug trade. 485 N.W.2d at 47. The *Condon* court failed to take such a realistic view.

Just as the petitioner questioned the evolution of the knock and announce rule as a constitutional requirement in our first point, the petitioner must also question the view of exigent circumstances which ignores the dangers faced by officers, and ignores the neutral magistrate's determination of probable cause that the officers will find evidence of criminality. The officers who executed this warrant were not going in blind. They had information gleaned from a four month investigation. The petitioner requests that this Court grant certiorari to examine the meaning of exigent circumstances in this context, and to reverse the judgment of the Supreme Court of Illinois.

CONCLUSION

For the foregoing reasons, petitioner requests that a Writ of Certiorari be issued to review the decision of the Supreme Court of the State of Illinois and, upon review, to reverse that court's decision in this case.

Respectfully submitted,

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APPENDICES

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APPENDIX A

[FILED MARCH 12, 1992]

Docket No. 70295 — Agenda 12 — January 1991.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. TIMOTHY CONDON, Appellee.

JUSTICE CUNNINGHAM delivered the opinion of the court:

Following a hearing in the circuit court of Du Page County, defendant's motion to suppress evidence found in his residence was denied by the trial court. After a bench trial, defendant, Timothy Condon, was found guilty of counts of armed violence (Ill. Rev. Stat. 1987, ch. 38, par. 33A-2), unlawful possession with intent to deliver cannabis (Ill. Rev. Stat. 1987, ch. 56½, par. 705(d)), unlawful possession with intent to deliver cocaine (Ill. Rev. Stat. 1987, ch. 56½, par. 1401(a)(2)), and unlawful delivery of controlled substances (Ill. Rev. Stat. 1987, ch. 56½, par. 1401(a)(2)). Defendant received concurrent sentences of 12 years on the armed violence count, 3 years on the unlawful possession of cannabis count, 12 years on the unlawful possession of cocaine count, and 12 years on the unlawful delivery of cocaine count.

Defendant appealed, and the appellate court reversed the order of the circuit court denying defendant's motion to suppress evidence, reversed defendant's armed violence conviction, and also reversed and remanded for a new trial the possession with intent to deliver cocaine, possession with intent to deliver marijuana and unlawful delivery of cocaine counts. (195 Ill. App. 3d 815.) From that judgment, the State appeals. This court granted leave to appeal pur-

suant to Supreme Court Rule 315. (134 Ill. 2d R. 315.) We affirm the judgment of the appellate court.

On November 6, 1987, at approximately 6:45 p.m., agents of the Du Page County Metropolitan Enforcement Group (DuMEG) executed a search warrant on a residence located at 1 North 535 Swift Road, Lombard, Illinois. Although the home was owned by defendant's brother, Bernard Condon, defendant also resided there.

The complaint on which the search warrant was based was prepared by Barbara Durnil, a DuMEG agent. In that complaint, Agent Durnil set forth her experience as a peace officer and familiarity with drugs and drug dealers. She indicated her information was that Bernard Condon had been arrested on November 7, 1985, for possessing approximately 41.53 grams of cocaine packaged to indicate it was for delivery, and also had in his possession at that time a loaded .22-caliber Baretta semi-automatic pistol. The charges against Bernard Condon for armed violence and unlawful delivery of a controlled substance were still pending at the time of the complaint, and the complaint went on to state that the Condon residence had been under surveillance by DuMEG agents since June of 1987.

The remainder of the information contained in the complaint was told to Agent Durnil by DuMEG Agent Charles Dvorak as follows. An individual identified as Roger Trenton told Agent Dvorak he had purchased cocaine from the Condon brothers at the 1 North 535 Swift Road address over a four-month period. Trenton said the residence contained two closed circuit television cameras, a police scanner to monitor traffic near the residence, and weapons to protect the cocaine and currency. According to Trenton, Bernard Condon brought the cocaine to the residence and sold it from a second-floor office.

Further, Agent Dvorak told Agent Durnil that he had precipitated a "buy" between Trenton and Timothy Condon at the Swift Road location on June 10, 1987, which proved to be cocaine, and that Trenton had again observed the surveillance cameras and police scanner at the residence.

The complaint further indicated that working undercover, Agent Durnill had arranged with Ben Adams to make cocaine purchases for her from the Condon residence on October 21, 1987, and again on November 5, 1987.

In executing the warrant, approximately 12 DuMEG officers wearing bullet-proof vests entered the Condon residence with the aid of a battering ram. According to defendant, the police did not knock, use the doorbell or announce themselves in any way. The State does not contest that the DuMEG officers did not knock and announce.

The defendant filed a motion to suppress evidence, and at the motion hearing, defendant stated he was in the kitchen and heard two loud bangs just before 12 S.W.A.T. officers forcibly entered the house. The defendant acknowledged the presence of surveillance cameras at both the front and rear entrances of the house with a monitor in the kitchen which could be switched back and forth between the two cameras, as well as a police scanner. Although the cameras were on, defendant said it was too dark to see anything on the monitor because no lights were on outside the house.

At oral argument, the State conceded that two unloaded guns were found in a first-floor bedroom. The remaining 11 guns were found in various rooms on the second floor, including a loaded revolver in defendant's bedroom and a loaded pistol in Bernard Condon's office. Defendant testified that most of the other guns were used for hunting, and included 10 shotguns and 1 rifle.

The only evidence offered by the State at the suppression hearing was the complaint for search warrant. In denying the motion to suppress, the trial court found there were exigent circumstances which justified the failure of the officers to knock and announce prior to entering the home.

The issues before us are whether exigent circumstances existed to warrant the unannounced entry and whether defendant was "otherwise armed" under the armed violence law when weapons were found throughout the house.

The State does not contest the defendant's assertion that the officers did not knock or announce their entry to the defendant and the other occupants of the house. The State argues that the totality of the circumstances which the officers faced here constituted sufficient exigent circumstances to excuse the officers' failure to knock and announce. We affirm the appellate court.

Since Illinois has no statutory requirement that officers knock and announce their authority and purpose prior to entering a dwelling, the propriety of such an entry must be determined by constitutional standards. (*People v. Ouellett* (1979), 78 Ill. 2d 511, 516.) Although the failure of law enforcement officers to knock and announce is not a *per se* constitutional violation, the presence or absence of such an announcement is an important consideration in determining whether a subsequent entry to arrest or search is constitutionally reasonable. (*People v. Saechao* (1989), 129 Ill. 2d 522, 531; *People v. Wolgemuth* (1977), 69 Ill. 2d 154, 166.) The purpose of the knock-and-announce rule is to notify the person inside of the presence of police and of the impending intrusion, give that person time to respond, avoid violence, and protect privacy as much as possible. (*Ouellette*, 78 Ill. 2d at 518.) Officers may be excused from the knock-and-announce requirement if exigent

circumstances exist sufficient to justify the intrusion. (*Ouellette*, 78 Ill. 2d at 516.) Where exigent circumstances exist, the failure of the police to knock and announce their authority and purpose in the execution of a search warrant for narcotics does not violate the fourth amendment right against unreasonable searches and seizures. (*Ouellette*, 78 Ill. 2d at 516.) Exigent circumstances may encompass such considerations as danger to the police officers executing the warrant, or the uselessness of the announcement, or the ease with which the evidence may be destroyed. *Ouellette*, 78 Ill. 2d at 518.

The exigent circumstances that the State points to are the presence of cocaine, the existence of surveillance cameras and a police radio scanner, the presence of weapons in the house, and the fact that the defendant's brother, Bernard Condon, was arrested in 1985 with cocaine and a loaded .22-caliber semi-automatic pistol in his possession. The State argues that if these circumstances are viewed synergistically, they must constitute exigent circumstances. While there is a certain appeal to the State's argument, we cannot agree that just because there are a number of circumstances, not one of which standing alone would create an exigency, the sheer volume of circumstances without something more is sufficient to create exigent circumstances. In the instant case, such a view would serve to defeat the purpose of the announcement requirement. The State presented no additional testimony at the suppression hearing. Therefore, our analysis of the exigent circumstances must necessarily center around the facts as presented in the search warrant relied on as the basis for the police officers' decision to enter the Condon residence without knock or announcement.

We must necessarily deal with each potential exigent circumstance individually, since the individual cir-

cumstances equal the totality. First, the officers were aware that defendant's brother, who owned the house, had been arrested two years earlier in 1985, with cocaine and a pistol in his possession. There is absolutely no indication from the record, however, that Bernard Condon had exhibited any violent or threatening behavior of any kind at the time of that arrest, and the charges brought in 1985 were still pending at the time of this incident. Only if the officers feared that Bernard Condon would use a gun against them were they justified in dispensing with the knock-and-announce requirement. (*Ouellette*, 78 Ill. 2d at 520, citing *People v. Dumas* (1973), 9 Cal. 3d 871, 878, 512 P.2d 1208, 1213, 109 Cal. Rptr. 304, 309; *People v. Hardin* (1989), 179 Ill. App. 3d 1072, 1076-77.) The warrant does not evidence such a fear.

The appellate court distinguished *Hardin* where defendant, who had been arrested at his residence some months earlier, was then found to have a handgun and told police they were lucky he did not get to his gun. (*Hardin*, 179 Ill. App. 3d at 1074.) We agree that the lack of knock and announcement was justified in *Hardin* because the police there could reasonably have assumed that the defendant intended to use the weapon against them because he threatened them at the earlier arrest. Here, however, there is nothing in the record to suggest that Bernard Condon had ever been violent or used the gun or even threatened to use it.

The State asks this court to rely on the reasoning of *People v. Trask* (1988), 167 Ill. App. 3d 694, as cited in *Hardin*, but we disagree with the State's interpretation of *Trask*. The *Trask* court said, "The police should not have be to certain that they will be shot at if they wait very long before entering; they just have to have a reasonable apprehension of danger." (*Trask*, 167 Ill. App. 3d

at 705.) The key words here are "wait very long." The police here did not knock or wait at all—they just barged in. Further, unlike the threat in *Trask*, there is nothing in the instant case to tell us the police had a "reasonable apprehension of danger."

The facts of the warrant support the officers' belief that narcotics were being sold from the Swift Road residence. The informant, Roger Trenton, indicated he had purchased cocaine at the residence. Ben Adams had made cocaine purchases for Agent Durnill from the Condon residence. The appellate court majority found, and we agree, that the presence of narcotics alone is not an exigent circumstance, but rather the police must have particular reasons to reasonably believe in a particular case that evidence will be destroyed. (*Ouellette*, 78 Ill. 2d at 520; *People v. Clark* (1986), 144 Ill. App. 3d 7, 11.) There is no contention by the State that the drugs were situated such that they could be easily destroyed. The mere fact that a search involves the discovery of drugs does not constitute an exigent circumstance.

The informant, Trenton, told Agent Dvorak that there were weapons in the house to protect the cocaine and currency. The warrant gives no other details concerning the weapons—type, quantity, location—or whether they had ever been used by anyone in the house in a violent manner. The statement "protect the cocaine and currency" is hardly conclusive that the weapons were to be used against the police. The appellate court majority properly relied upon this court's ruling in *Ouellette* that the existence of a weapon should excuse the knock-and-announce rule only where the officers reasonably believe the weapon will be used against them if they proceed with ordinary announcements. (*Ouellette*, 78 Ill. 2d at 520.) The State

has provided no evidence which would support such a belief on the part of the DuMEG officers.

Finally, the warrant adds the surveillance cameras and the police scanner to the equation. The State argues that the "advance warning system" made any announcement "useless." We disagree. It was the unrebutted testimony of the defendant that the outside lights were not on and therefore nothing could be seen on the monitor. The police should have known that the cameras were ineffective without lighting. But, even if the occupants of the house had been aware of the police approaching via the surveillance cameras or the police scanner, it does not necessarily follow that they would have "gone for their guns" since, we reiterate, there is nothing in the warrant or the record to indicate that these were exceptionally dangerous people with a proclivity for violence. Again, there is nothing to indicate that the police officers reasonably believed that a weapon would be used against them if they did announce. (*Ouellette*, 78 Ill. 2d at 520.) Furthermore, the same holds true for the destruction of evidence. Nothing in the warrant or in the record indicates that the defendant or the other occupants of the house had devised any procedure for quick destruction of the evidence. We agree with the majority of the appellate court that in this instance, the surveillance equipment and scanner did not constitute an exigent circumstance which relieved the police of their knock-and-announce responsibility.

The State laments the fact that the appellate court majority gave "short shrift" to the totality of the circumstances analysis. The State urges that the combination of drugs, plus weapons, plus surveillance equipment equals exigent circumstances even though not one of those circumstances as they exist in the instant case, standing alone, would constitute an exigent circumstance. We dis-

agree because such an analysis would serve to defeat the purpose of the knock-and-announce rule—to notify the person inside of the presence of police and of the impending intrusion, give that person time to respond, avoid violence, and protect privacy as much as possible. (*Ouellette*, 78 Ill. 2d at 518.) In the case at bar, there was no notice to the persons inside the house of the impending intrusion, no time to respond, and no privacy protected. Had the defendant been in a different position than he was found, sitting down to have his dinner, he may have been sufficiently upset to have reacted violently to such a startling entrance. Had the defendant or any of the other occupants of the house had a gun at hand, such an unexpected entrance may well have precipitated a violent encounter since the occupants of the house could have thought the intruders were thieves out to steal their drugs and currency. On the other hand, had the police knocked and announced their purpose, the defendant and his friends may well have thought long and hard about entering into a gun battle with the police had they been in a position to do so. Thankfully, they were not in such a position. Again, if the police had information that there were persons involved who were associated with violent or assaultive behavior, that would have presented a different scenario than the one we are given by the search warrant.

Indeed, the need for compliance with the knock-and-announce rule would seem to be even greater where the police know there are weapons present, but the persons involved are not known to have a propensity to use weapons. Any citizen in the privacy of his or her home might resort to the use of violence if threatened by a completely unexpected and unannounced entry into the home, let alone someone who is involved in the world of drugs. Again, we reiterate that the purpose of the knock-and-

announce rule is to prevent what could turn out to be deadly encounters between police and citizens. Therefore, we decline to adopt a totality of the circumstances rule which, in this case, would serve to defeat that purpose. We hold that sufficient exigent circumstances did not exist in this case to excuse the DuMEG agents from knocking at the door of defendant's residence and announcing their purpose before entering.

Accordingly, we affirm the appellate court majority's finding that the trial court's denial of the motion to suppress was manifestly erroneous under the facts of this case. (195 Ill. App. 3d at 823.) Since the evidence resulting from the illegal search was improperly admitted, the appellate court properly reversed defendant's convictions on the possession of marijuana, possession of cocaine, and unlawful delivery of cocaine counts and remanded for a new trial. 195 Ill. App. 3d at 824-25.

We are not deaf to the argument of the appellate court dissent that police officers should not be forced to face unnecessary danger when attempting to execute warrants. (195 Ill. App. 3d at 827 (Geiger, J., dissenting).) We agree, but this court must be careful to strike the proper balance between individual rights and the police power of the State. The knock-and-announce rule with its exigent circumstances exception is intended to do just that as well as to protect the police from unnecessary danger. We therefore refuse the State's invitation to dispense with the knock-and-announce rule in assessing the reasonableness of the entry of law enforcement authorities to execute a valid search or arrest warrant.

The final issue for our consideration is whether the defendant was "otherwise armed" under the armed violence law when weapons were found throughout the house. We hold that he was not "otherwise armed."

The armed violence statute states, "A person commits armed violence when, while armed with a dangerous weapon, he commits any felony defined by Illinois Law" (Ill. Rev. Stat. 1987, ch. 38, par. 33A-2). The statute defines the phrase "armed with a dangerous weapon": "A person is considered armed with a dangerous weapon for purposes of this Article, when he carries on or about his person or is otherwise armed with a category I or category II weapon" (Ill. Rev. Stat. 1987, ch. 38, par. 33A-1(a)). The State urges us to find that the defendant was in "constructive possession" of the weapons in the house such that he was otherwise armed for purposes of the armed violence statute. We decline to make such a finding.

The armed violence statute (Ill. Rev. Stat. 1979, ch. 38, par. 33A-1 *et seq.*) was enacted in 1967 " 'to respond emphatically to the growing incidence of violent crime.' " (*People v. Alejos* (1983), 97 Ill. 2d 502, 507-08, quoting *People v. Graham* (1975), 25 Ill. App. 3d 853, 858.) The intended purpose of the armed violence statute is to deter felons from using dangerous weapons so as to avoid the deadly consequences which might result if the felony victim resists. (*Alejos*, 97 Ill. 2d at 508.) That deterrent purpose is not served under the circumstances of this case.

A felon with a weapon at his or her disposal is forced to make a spontaneous and often instantaneous decision to kill without time to reflect on the use of such deadly force. (*People v. Eure* (1986), 140 Ill. App. 3d 387, 393.) Without a weapon at hand, the felon is not faced with such a deadly decision. Hence, we have the deterrent purpose of the armed violence statute. Thus, for this purpose to be served, it would be necessary that the defendant have some type of *immediate access to* or *timely control over* the weapon.

In the instant case, there were a number of guns, including two loaded pistols, discovered at various locations throughout the house. The defendant was found in the kitchen where there were no guns. Most of the guns were located on the second floor of the house. Only an unloaded shotgun and unloaded rifle were found in a first-floor bedroom. It was impossible for the defendant to use the guns as they were situated because they were too far removed from the defendant. The danger that the defendant would be forced to make an instantaneous decision to use the guns was nonexistent because he had no "immediate access to" or "timely control over" the guns.

The underlying felonies in this case were delivery of and possession of more than 15 grams of a controlled substance, cocaine, with the intent to deliver. There is no evidence that the defendant used or displayed the guns during the delivery of cocaine. The State contends that because the possession of cocaine was an ongoing felony, and the guns were in the house with the cocaine, the armed violence statute should apply. Such a finding reaches too far. Were we to find the presence of guns in the house with the cocaine enough to violate the armed violence statute, such a finding would be contrary to the purpose for which the statute was enacted. Rather, we find that defendant would have had to carry a weapon on his person or alternatively to have had "immediate access to" or "timely control over" a weapon when the police entered to have been "otherwise armed" for purposes of the statute.

The State refers to *People v. Haron* (1981), 85 Ill. 2d 261, where this court stated that "the mere physical presence of a weapon while a crime is being committed is thought to be a sufficient threat to warrant proscription." (*Haron*, 85 Ill. 2d at 268.) The context in which that particular statement was made is instructive in this case. In setting forth comparable weapons statutes of other States which require no connection between the predicate offense and the presence of a weapon, we pointed out the two legislative approaches to the problem of armed violence. In one approach, the weapon must be used, while the other approach "prohibits and punishes the mere *possession or carrying* of a weapon during the commission of a crime." (Emphasis added.) (*Haron*, 85 Ill. 2d at 268.) In the present case, defendant did not possess or carry a weapon during the commission of the crime.

In support of its constructive possession theory, the State cites three appellate court decisions. In *People v. Bond* (1989), 178 Ill. App. 3d 1020, the defendant was convicted of armed violence, the underlying felony for which was unlawful possession of a controlled substance, cocaine. The *Bond* court found that although "the gun was not physically in defendant's hands or in actual contact with his 'person,' it was *immediately accessible.*" (Emphasis added.) (*Bond*, 178 Ill. App. 3d at 1023.) The gun was, in fact, underneath the cushion of the sofa upon which defendant was seated. "The mere *physical existence* of a weapon is not within the meaning of the [armed violence] statute." (Emphasis added.) (*Bond*, 178 Ill. App. 3d at 1023.) We agree.

Similarly, in *People v. King* (1987), 155 Ill. App. 3d 363, the appellate court disallowed equating the definition of presence of the weapon with the mere physical existence of the weapon. "Taken to its logical conclusion, a defendant could be convicted of armed violence, in an otherwise factually similar situation as is present in this case [gun lying on table in bedroom], simply because a weapon was located anywhere in the home. This is a result not

intended by the legislature." (*King*, 155 Ill. App. 3d at 368-69.) We agree.

In *People v. Zambetta* (1985), 132 Ill. App. 3d 740, the court found that the defendant constructively possessed a loaded revolver which was found in the glove compartment of the car owned and being driven by defendant during an unlawful delivery of a controlled substance, cocaine. "Where the defendant does not have personal physical possession, yet has the intent and capability to maintain control and possession, and the defendant knows of the presence of the weapon, the defendant can be said to have constructive possession." (*Zambetta*, 132 Ill. App. 3d at 750, citing *People v. Turnbeaugh* (1983), 116 Ill. App. 3d 199, 205; *People v. McNeely* (1981), 99 Ill. App. 3d 1021, 1023-24.) The defendant in *Zambetta* was in the car an arm's length from the gun. We suggest that defendant Condon did not have the capability to maintain control and possession of guns that were not even in the same room with him. Thus, we also find the State's theory of constructive possession to be of doubtful persuasion under the facts of the instant case. We therefore also affirm that part of the appellate court judgment that reversed the defendant's armed violence conviction.

The judgment of the appellate court is affirmed.

Affirmed.

CHIEF JUSTICE MILLER, dissenting:

I do not agree with either of the majority's holdings in this case: that the trial court erred in denying the defendant's suppression motion, and that the evidence will not sustain the defendant's conviction for armed violence. Accordingly, I dissent.

With regard to the suppression issue, the majority concludes that the circumstances in this case did not excuse the failure of the law enforcement officers here to comply with the knock-and-announce rule. The court thus holds that the officers executing the search warrant should have announced their authority and purpose before they entered the subject premises. On this basis, then, the majority concludes that the trial judge erred in denying the defendant's motion to suppress evidence.

The knock-and-announce rule is intended to promote privacy and to safeguard both residents and officers during the execution of arrest and search warrants. (*People v. Ouellette* (1979), 78 Ill. 2d 511, 518; *People v. Wolgemuth* (1977), 69 Ill. 2d 154, 166.) Compliance with the knock-and-announce rule is an important consideration in determining the reasonableness of police entry into a private dwelling to make an arrest or to conduct a search. (*People v. Saechao* (1989), 129 Ill. 2d 522, 531; *Wolgemuth*, 69 Ill. 2d at 166.) In appropriate circumstances, however, compliance with the rule may be excused. (*Ouellette*, 78 Ill. 2d at 516; *People v. Conner* (1979), 78 Ill. 2d 525, 531.) Relevant to this determination are, among other things, the danger posed to the officers executing the warrant, the relative usefulness or uselessness of an announcement, and the ease with which the sought-after evidence might be destroyed. *Ouellette*, 78 Ill. 2d at 518.

As a preliminary matter, I question the majority's refusal to examine the circumstances as a whole in assessing the propriety of the officers' actions. The touchstone of the inquiry is the reasonableness of the challenged conduct, and that assessment cannot be reliably made if each fact or circumstance is viewed in isolation. It is not necessary that any one circumstance alone supply the necessary exigency that will excuse an official failure to comply with the knock-and-announce rule; rather, the determination should be based on a consideration of all the circumstances bearing on the reasonableness of the police entry. See *Conner*, 78 Ill. 2d at 533 ("Based on a consideration of all of these facts," the court found exigent circumstances sufficient to excuse compliance with knock-and-announce rule); *People v. Fonville* (1987), 158 Ill. App. 3d 676, 684.

In the present case, the officers executing the search warrant were aware of a number of special circumstances that justified their decision to enter the premises without first announcing their authority and purpose to the persons inside. Here, the officers knew that closed-circuit television cameras were trained on the front and rear entrances of the structure, that a police scanner kept the occupants informed of police radio transmissions in the vicinity, and that numerous weapons were located inside the structure. The police also knew that the building was owned by the defendant's brother, who was facing felony charges involving the possession of a loaded handgun and the possession of cocaine.

In view of these circumstances, I would conclude that the officers acted reasonably in entering the building to execute the search warrant without complying with the knock-and-announce rule. The occupants' use of the surveillance cameras and police scanner certainly reduced,

if it did not eliminate, the utility of an announcement of the officers' presence. The elaborate and unusual security measures would have provided the building occupants with the opportunity to destroy the contraband and to attempt to resist the police entry. The officers were also aware that a number of guns were kept on the premises, and that those weapons were used to protect the drugs and money involved in the illegal operations. The reasonableness of the officers' conduct must be assessed in the light of what the officers knew at the time of the entry, and therefore it is no answer here to assert, as the majority does, that the surveillance cameras were not functioning during the evening of the search and, moreover, that the officers should have realized that (slip op. at 6). On the present record, I would conclude that exigent circumstances excused the officers' failure to comply with the knock-and-announce rule.

I also disagree with the majority's holding that the evidence will not sustain the defendant's conviction for armed violence. As the record reveals, more than a dozen firearms were found on the premises. In my view, the presence of these weapons, in various places throughout the structure, satisfied the statutory requirement that the accused be armed. (Ill. Rev. Stat. 1987, ch. 38, par. 33A-2.) Applying the majority's own construction of the statutory language, I would conclude that the defendant, on either instance charged, had "immediate access to" or "timely control over" at least one of the many weapons located throughout the premises.

For the reasons I have stated, I dissent. I would remand the cause to the appellate court for consideration of other issues previously raised but not decided in that court.

APPENDIX B

(Letterhead Of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

June 1, 1992

State's Attorneys Appellate Prosecutor
Second Judicial District
2032 Larkin Ave.
Elgin, IL 60123

No. 70295—People State of Illinois, appellant, v. Timothy Condon, appellee. Appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on June 11, 1992.

APPENDIX C

[FILED MARCH 27, 1990]

No. 2-88-1069

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

TIMOTHY CONDON,
Defendant-Appellee.

Appeal from the Circuit Court of DuPage County.
Nos. 87-CF-2146
87-CF-2147
Hon. Ronald B. Mehling, Judge, Presiding.

JUSTICE REINHARD delivered the opinion of the court:

Defendant, Timothy Condon, was indicted in the circuit court of Du Page County on one count of armed violence (Ill. Rev. Stat. 1987, ch. 38, par. 33A-2), one count of unlawful delivery of more than 15 grams of a substance containing cocaine (Ill. Rev. Stat. 1987, ch. 56½, par. 1401 (a)(2)), one count of unlawful possession with the intent to deliver more than 15 grams of a substance containing cocaine (Ill. Rev. Stat. 1987, ch. 56½, par. 1401(a)(2)), one count of unlawful possession with the intent to deliver

more than 30 grams but not more than 500 grams of a substance containing cannabis (Ill. Rev. Stat. 1987, ch. 56½, par. 705(d)), one count of conspiracy to deliver 15 grams or more of a substance containing cocaine (Ill. Rev. Stat. 1987, ch. 56½, par. 1405(a)), one count of narcotics racketeering (Ill. Rev. Stat. 1987, ch. 56½, par. 1654(a)), and one count of unlawful delivery of 30 grams or more of a substance containing cocaine (Ill. Rev. Stat. 1987, ch. 56½, par. 1401(a)(2)). Following a bench trial, defendant was found guilty of the first four counts and not guilty of the latter three. He was sentenced to 12 years' imprisonment on the armed violence conviction, 12 years' imprisonment on the possession with intent to deliver cocaine conviction, 12 years on the delivery of cocaine conviction, and 3 years on the possession with intent to deliver marijuana conviction, with all sentences to run concurrently.

The following issues are raised on appeal: (1) whether the failure of the police to knock and announce prior to executing the search warrant for defendant's residence renders the search of defendant's residence unreasonable; (2) whether defendant was proved guilty beyond a reasonable doubt of the two counts charging possession with intent to deliver cocaine and possession with intent to deliver marijuana; (3) whether defendant was proved guilty beyond a reasonable doubt of armed violence; (4) whether defendant was proved guilty beyond a reasonable doubt of unlawful delivery of more than 15 grams of a substance containing cocaine; (5) whether the trial court erred in denying defendant a *Franks* hearing; (6) whether the trial court erred in denying defendant's motion to dismiss and his motion in arrest of judgment as to the armed violence count; and (7) whether the trial court erred in admitting testimony of unrelated criminal conduct.

On November 6, 1987, at approximately 6:45 p.m., agents of the Du Page County Metropolitan Enforcement Group (DuMEG) executed a search warrant on a residence located at 1 N. 535 Swift Road, Lombard, Illinois. Defendant resided at that address, but the home was owned by defendant's brother, Bernard J. Condon. Bernard Condon was a codefendant with defendant, but was a fugitive at the time of defendant's trial.

According to the complaint for search warrant, prepared by DuMEG agent, Barbara Durnil, Agent Charles Dvorak was informed by Roger Trenton that Trenton had purchased cocaine on several occasions from Bernard Condon and defendant at the 1 N. 535 Swift Road residence. Trenton also told Dvorak that defendant and his brother would distribute cocaine at the residence between 6 p.m. and 9 p.m. According to Trenton, there were two closed circuit television cameras and a police scanner to monitor traffic near the residence and that there were several weapons located in the residence to protect the cocaine and currency.

The complaint further states that on June 10, 1987, Dvorak completed a purchase of cocaine by sending Trenton into the residence where he purchased cocaine from defendant. Trenton told Dvorak that the sale occurred in the second floor office of the residence. According to Dvorak, while at defendant's residence on June 10, 1987, he observed two surveillance cameras, one at the front door and one at the rear door. Dvorak also observed a police radio scanner on the kitchen counter as he was sitting in his vehicle in the driveway.

The complaint for search warrant also stated that an individual named Ben Adams, who sold cocaine to Agent Durnil, had indicated that his source was located at 1 N. 535 Swift Road, defendant's residence.

The defendant's evidence, adduced at the hearing on defendant's motion to suppress evidence, indicates that defendant was in the kitchen of the residence at the time the police executed the warrant. According to defendant, the police did not knock, use the doorbell, or announce themselves. Defendant heard two loud bangs, and at least a dozen police officers, who defendant described as S.W.A.T. officers, forcibly entered the house.

Defendant admitted in cross-examination that there is a surveillance camera at both the front and back doors of the house and a monitor in the kitchen capable of switching from one camera to the other. According to defendant, the surveillance cameras were on at the time the police entered his home, but it was too dark to see anything. Defendant further admitted that he had 13 guns in the house, including a loaded revolver in his bedroom. Most of the weapons were shotguns that defendant said he used for hunting.

The State only offered the complaint for search warrant at the suppression hearing. The trial court denied defendant's motion to suppress, finding that there were exigent circumstances which justified the officers' failure to knock and announce prior to entering the home.

The State did not contend below nor does it on appeal that the police officers knocked and announced in this case. The evidence at the suppression hearing and the trial establishes that they did not knock and announce, but, rather, gained entrance by using a battering ram against the front door.

At trial, Officer Michael Sullivan testified that on November 6, 1987, while conducting surveillance on the Condon residence, he observed Agent Durnil and Ben Adams arrive at the residence. Adams exited the vehi-

cle, entered the residence, exited the residence, and reentered Durnil's vehicle. Durnil then drove away, and Sullivan was advised by radio shortly thereafter that Adams was arrested with cocaine in his possession. He then observed the team of officers execute the search warrant of defendant's premises. They wore bullet proof vests, had special weapons, and used a ram and access equipment.

Ben Adams testified that he went with Durnil to the house on November 6, 1987, to purchase an ounce of cocaine. He met defendant and gave him $1,900 in prerecorded money. Defendant counted the money, and his brother, Bernard Condon, went upstairs. About 5 to 10 minutes later, defendant's brother returned to the kitchen and handed what Adams assumed to be an ounce of cocaine to defendant. Defendant in turn placed the substance on the counter and said "[t]here you go." The substance was later determined by laboratory analysis to contain cocaine. Defendant placed the $1,900 in his front pocket after counting it. At the time of defendant's arrest in the kitchen, the prerecorded money was found on the floor near defendant. A search of the house revealed cocaine and marijuana in the second floor office.

Joseph Nebren, testifying for the State, stated that on at least one occasion in 1987 he had purchased a white, powdery substance he believed to be cocaine from defendant and that the transaction occurred in an office located on the second floor of the Condon residence. On cross-examination, Nebren admitted lying to the grand jury when he testified that he had never purchased cocaine from defendant and that he was now testifying pursuant to a grant of immunity.

Karen Schaeffer, defendant's fiancee, testified for defendant that she lived with defendant at 1 N. 535 Swift Road

for about three months and that Bernard Condon owned the house. According to Schaeffer, there are four bedrooms upstairs, one of which was Bernard Condon's office, and that the office was kept locked all the time. Bernard Condon had the only key to the door and to the lockbox which contained the cocaine. According to Schaeffer, defendant did not have a key to either the office or the lockbox. She never saw defendant open the office door or the lockbox, and Bernard Condon was the only person to open the office door or open the lockbox. Defendant did not testify or offer any other witnesses.

We first address defendant's contention that the unannounced entry by the law enforcement officers was constitutionally unreasonable under the circumstances. Although the failure of law enforcement officers to announce their authority and purpose prior to entering a dwelling is not a *per se* constitutional violation, the presence or absence of such an announcement is an important consideration in determining whether a subsequent entry to arrest or search is constitutionally reasonable. (*People v. Saechao* (1989), 129 Ill. 2d 522, 531, 544 N.E.2d 745; *People v. Wolgemuth* (1977), 69 Ill. 2d 154, 156, 370 N.E.2d 1067.) The purpose of the knock-and-announce rule is to notify the person inside of the presence of the police and of the impending intrusion, give that person time to respond, avoid violence and protect privacy as much as possible. (*People v. Ouellette* (1979), 78 Ill. 2d 511, 518, 401 N.E. 2d 507.) Exigent circumstances may, in a proper case, excuse the failure of officers to knock and announce before entering a dwelling to execute a warrant. (*Saechao*, 129 Ill. 2d at 531, 544 N.E.2d at 749; *Ouellette*, 78 Ill. 2d at 518, 401 N.E.2d at 510.) Exigent circumstances may encompass such considerations as danger to the police executing the warrant, the uselessness of the announcement, or the ease

with which the evidence may be destroyed. *Ouellette*, 78 Ill. 2d at 518-19, 401 N.E.2d at 510.

The State contends that there were exigent circumstances here sufficient to excuse the law enforcement officers' failure to knock and announce. Specifically, it argues that the presence of cocaine, the existence of surveillance cameras and a police radio scanner, the presence of weapons in the house, and the fact that defendant's brother was arrested in 1985 with cocaine and a loaded .22 caliber semiautomatic pistol in his possession constitute exigent circumstances justifying the failure to knock and announce. The State relied solely on the statements in the complaint for search warrant to show exigent circumstances and did not present any testimony by the law enforcement officers to support their failure to knock and announce their presence.

Existence of narcotics alone is not an exigent circumstance, but rather the police must have particular reasons to believe reasonably in a particular case that evidence will be destroyed. (*Ouellette*, 78 Ill. 2d at 520, 401 N.E.2d at 511; *People v. Clark* (1986), 144 Ill. App. 3d 7, 11, 494 N.E.2d 166.) Here, there is no evidence that the cocaine was situated so as to be readily disposed of, and the State has not contended otherwise. Thus, the mere fact that cocaine was the object of the search does not constitute an exigent circumstance.

The informant's general statement that there were several weapons in the house to protect the cocaine and currency does not comprise an exigent circumstance either. The existence of a weapon should excuse the knock-and-announce rule only where the officers reasonably believe the weapon will be used against them if they proceed with the ordinary announcements. (*Ouellette*, 78 Ill. 2d at 520,

401 N.E.2d at 511.) The presence of weapons alone does not create an exigent circumstance. (*People v. Marinez* (1987), 160 Ill. App. 3d 349, 352, 513 N.E.2d 607.) Furthermore, the informant's statement that the weapons were to protect cocaine and currency is conclusory at best. It does not identify the type of weapons or any facts which support the conclusion that the weapons located in the house would be used against law enforcement officers for the purpose of protecting cocaine and currency. There are no references to any statements by defendant or any other occupant of the house indicating the purpose of the weapons or any reference to other facts which would support that conclusion. Accordingly, the bare statement that there were weapons in the house to protect cocaine and currency does not constitute an exigent circumstance. In so holding, we note the lack of evidence as to whether the weapons were loaded, what type of weapons were involved, the ready accessibility of the weapons, the likelihood that any of the weapons would be used by the occupants of the home against police, or that any of the occupants had ever used the guns against law enforcement officers or anyone else. Moreover, giving notice of the presence of the police seems compelling in the face of startling someone with a weapon, absent evidence that the weapon will be used against the police. *Ouellette*, 78 Ill. 2d at 520, 401 N.E.2d at 511.

The police were also aware that approximately two years earlier defendant's brother, the owner of the house, had been arrested for possession of cocaine and had a loaded .22 caliber semiautomatic pistol in his possession at the time of his arrest. Although such a fact is particularly relevant to the question of the necessity of knocking and announcing, it is insufficient to justify the unannounced entry in this case. Again, the knock-and-announce

rule should only be excused where the officers reasonably believe that a weapon will be used against them if they do announce. *Ouellette*, 78 Ill. 2d at 520, 401 N.E.2d at 511; *People v. Hardin* (1989), 179 Ill. App. 3d 1072, 1076-77, 535 N.E.2d 1044.

In this case, defendant's brother had a loaded semiautomatic pistol in his possession two years prior to execution of the warrant. There is no evidence that he used, attempted to use, or was inclined to use the pistol against police at the time he was arrested (see *Hardin*, 179 Ill. App. 3d at 1077, 535 N.E.2d at 1046 (where defendant told officers at the time of his prior arrest that they were fortunate that he did not get to his gun)), that he had violent propensities, that he had ever used force against a police officer, or that he had ever been convicted of a violent crime involving the use of weapons. Nor is there any evidence that he would be carrying or have ready access to a loaded weapon at the time the warrant was to be executed, or that he was likely to use the weapon against the police. The mere fact that he had possessed a loaded weapon when arrested two years before does not, alone, constitute an exigent circumstance, particularly where there is no other evidence of his likelihood to use the weapon.

The last fact asserted as an exigent circumstance was the presence of a surveillance camera at the front and back of defendant's residence and a police radio scanner in the kitchen. We do not believe, under these particular circumstances, that the existence of surveillance equipment constitutes an exigent circumstance justifying an unannounced entry. The mere presence of surveillance cameras and a police scanner does not constitute a threat to police safety absent some evidence that the occupants are likely to use violence against the police or are likely

to destroy evidence. The mere fact that the occupants are able to observe the approach or presence of the public, including the police, does not create an exigency where there is no evidence that the occupants will utilize their observations to cause violence or dispose of evidence. Nor do we believe that all these various circumstances viewed in their totality constitute an exigency sufficient to justify the unannounced entry in this case. Accordingly, we find the trial court's denial of the motion to suppress to be manifestly erroneous under the facts of this case.

In so holding, we are particularly mindful of the potentially dangerous and volatile situation faced by law enforcement officers who execute warrants on suspected drug traffickers; however, we must not lose sight of one of the purposes of the knock-and-announce rule which is to avoid violence. Because of the violent and competitive nature of the drug trade, there is the risk that drug traffickers may resort to violence if confronted with an unannounced and unidentified violent entry by unknown persons. Absent specific, particularized evidence that the suspected traffickers will likely use force against an announced police entry, the police are generally less likely to encounter a violent situation by announcing their authority and purpose. See *Ouellette*, 78 Ill. 2d at 520, 401 N.E.2d at 511.

The State alternatively contends that we abandon the knock-and-announce requirement, particularly in narcotics cases, and follow the dissent in *Ouellette*. We are disinclined to do so for several reasons. First, as an intermediate appellate court, we are bound to follow the decisions of our supreme court. (*Agricultural Transportation Association v. Carpentier* (1953), 2 Ill. 2d 19, 27, 116 N.E. 2d 863; *People v. Palmer* (1986), 141 Ill. App. 3d 234, 238, 490 N.E.2d 154.) Second, we believe the knock-and-announce

rule has continued vitality as it was recently reaffirmed by our supreme court in *People v. Saechao* (1989), 129 Ill. 2d 522, 531, 544 N.E.2d 745. Finally, we believe the knock-and-announce rule, with its exigent circumstances exception, strikes the proper balance between an individual's privacy interest in his home and the State's interest in safe and effective law enforcement.

Because of our conclusion that all the evidence seized as a result of the search of defendant's residence should be suppressed, there is little likelihood that the State will have sufficient evidence to retry defendant on the possession of marijuana, possession of cocaine, and armed violence counts. We are compelled, however, to consider the reasonable doubt issue, raised by defendant on appeal as to those three counts, pursuant to *People v. Taylor* (1979), 76 Ill. 2d 289, 309, 391 N.E.2d 366. In doing so, we must consider the suppressed evidence as well. *Lockhart v. Nelson* (1988), 488 U.S. ____, 102 L. Ed. 2d 265, 109 S. Ct. 285.

As to the possession of marijuana and possession of cocaine counts, an examination of the evidence reveals that defendant resided in the home with his fiancee. Where narcotics are found on the premises under the control of the defendant, this fact, in and of itself, gives rise to an inference of knowledge and possession by the defendant which may be sufficient to sustain a conviction of unlawful possession, absent other facts and circumstances which might create a reasonable doubt as to his guilt. (*People v. Galloway* (1963), 28 Ill. 2d 355, 358, 192 N.E.2d 370; *People v. Trask* (1988), 167 Ill. App. 3d 694, 707, 521 N.E.2d 1222.) Whether there is possession and knowledge is a question of fact, the determination of which will not be disturbed on review unless the evidence is so palpably contrary to the verdict, or so unreasonable, improbable

or unsatisfactory as to create a reasonable doubt of guilt. (*Galloway*, 28 Ill. 2d at 358, 192 N.E.2d at 372; *Trask*, 167 Ill. App. 3d at 707, 521 N.E.2d at 1231.) In examining all of the evidence, we believe the State proved defendant guilty beyond a reasonable doubt of possession with the intent to deliver cocaine and possession with intent to deliver marijuana. Accordingly, because the evidence obtained pursuant to the illegal search was improperly admitted, we reverse defendant's convictions of these two counts and remand for a new trial.

We address next defendant's conviction of armed violence. Defendant contends, relying on *People v. King* (1987), 155 Ill. App. 3d 363, 507 N.E.2d 1285, that he was not proved guilty of the offense of armed violence because the evidence fails to establish that he "carried on or about his person or was otherwise armed" with a deadly or dangerous weapon pursuant to the statutory definition contained in section 33A-1 of the Criminal Code of 1961 (Ill. Rev. Stat. 1987, ch. 38, par. 33A-1). The State responds that defendant had knowledge of and control over the various weapons located in the house, particularly the loaded pistol in the headboard of his second floor bedroom and the loaded pistol in the second floor office where the cocaine was located, and therefore he was "otherwise armed" within the meaning of the armed violence statute. In essence, as the State further elaborated in oral argument, defendant constructively possessed the weapons because the weapons were found in a home occupied by him and therefore he was "otherwise armed."

The armed violence statute makes it a felony to commit, while armed with a dangerous weapon, any felony under Illinois law. (*People v. Alejos* (1983), 97 Ill. 2d 502, 508, 455 N.E.2d 48.) The mere presence of a weapon and not its actual use is sufficient to meet the requirements

of the armed violence statute. (*Alejos*, 97 Ill. 2d at 507, 455 N.E.2d at 50.) Although the statute does not require use of the weapon, it does require that the person carry the weapon on or about his person or be otherwise armed. (*People v. King* (1987), 155 Ill. App. 3d 363, 369, 507 N.E. 2d 1285.) The mere physical existence of the weapon, without knowledge or control, including immediate access to the weapon, is not within the meaning of the armed violence statute. *King*, 155 Ill. App. 3d at 369, 507 N.E.2d at 1288.

Here, although there is ample evidence that various weapons, including two loaded pistols, were present in the house, there is no evidence that defendant possessed or had immediate access to any of them while committing a felony, either during the delivery of cocaine to Ben Adams or at the time the law enforcement officers entered defendant's residence, found the cocaine and marijuana, and arrested him. Defendant was found in the kitchen of his house, and the loaded pistols and numerous unloaded weapons were located on the second floor. The only weapons on the first floor were an unloaded shotgun and unloaded .22 caliber rifle found in the downstairs bedroom. Thus, defendant was not "otherwise armed" within the meaning of the armed violence statute, and his conviction of that offense must be reversed without remandment for a new trial.

We would note that the question of whether defendant constructively possessed the various weapons might be relevant to other offenses where possession is an element; however, it is not dispositive of the question of whether defendant was otherwise armed for purposes of the armed violence statute. As noted in *People v. King* (1987), 155 Ill. App. 3d 363, 507 N.E.2d 1285, the basic legal concepts are different between an armed violence situation and an

unlawful possession scenario. (155 Ill. App. 3d at 369, 507 N.E.2d at 1289.) We agree with the reasoning of *King*.

We next consider defendant's contention that he was not proved guilty beyond a reasonable doubt of unlawful delivery of cocaine to Ben Adams. We note that the trial court expressly considered corroborative evidence along with the admissible testimony of Ben Adams. The corroborative evidence included $1,900 in prerecorded money from Adams found on the floor near defendant, cocaine, and a ledger book recording the transaction with Adams for which he was charged, all recovered as a result of the unconstitutional entry into the residence. Consideration of the illegally obtained evidence in corroboration of Adams' testimony prejudiced defendant to the extent we must reverse the trial court's finding of guilt as to the unlawful delivery count. We remand for a new trial, however, as all of the evidence was sufficient to prove defendant guilty beyond a reasonable doubt of unlawful delivery of cocaine.

Due to our disposition of the foregoing issues, we need not address the remaining issues raised by defendant.

We therefore reverse the order of the circuit court of Du Page County denying defendant's motion to suppress the evidence discovered in his residence. We also reverse and remand for a new trial on the possession with intent to deliver cocaine, possession with intent to deliver marijuana, and unlawful delivery of cocaine counts. We reverse defendant's armed violence conviction.

The judgment of the circuit court of Du Page County is reversed in part and reversed and remanded in part.

Reversed in part; reversed and remanded in part.

WOODWARD, J., concurs.

JUSTICE GEIGER, dissenting:

I respectfully dissent.

As my colleagues have stated, we must be particularly mindful of the potentially dangerous and volatile situation faced by law enforcement officers who execute warrants on suspected drug traffickers. While the majority may be correct that the police are generally less likely to encounter violence if they announce their authority and purpose before entering a building to execute a warrant, the elevation of that general principle to a rule of law under facts as extreme as these may result in tragic consequences. Law enforcement officers, in attempting to conform their entry tactics to the majority's opinion, may well face unnecessary danger.

When viewed as a totality, the complaint for a search warrant in this case established that the residence was protected by television monitors and a police scanner and that several weapons were available to the occupants. The police were also aware that one of the residents of the house had been arrested with cocaine and a loaded pistol on his person and that he was facing charges of armed violence, a forcible felony, and unlawful delivery of a controlled substance. The combination of these factors, in my opinion, satisfies the test of exigent circumstances set out in *People v. Ouellette* (1979), 78 Ill. 2d 511, 401 N.E.2d 507, and restated by this court in *People v. Hardin* (1989), 179 Ill. App. 3d 1072, 535 N.E.2d 1044.

The distinction between the facts in this case and those in *Hardin* is too fine. We are by this decision, as Justice Ward said in his dissent in *Ouellette*, "calling upon officers whose lives may be at stake to make nice judgments as to whether decisions that their lives are im-

periled are reasonable" (78 Ill. 2d at 525, 401 N.E.2d at 513). I would find that the police acted properly and would affirm the trial court.

[Certification of Clerk omitted in printing.]

APPENDIX D

(Letterhead Of)
STATE OF ILLINOIS
APPELLATE COURT SECOND DISTRICT

Appeal from the Circuit Court of County of DuPage

Trial Court Number: 87CF2146

THE COURT HAS THIS DAY, 04/27/90, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-88-1069

People v. Condon, Timothy

Petition by appellee for rehearing is denied. (Reinhard, Woodward, Geiger, JJJ.)

LOREN J. STROTZ, Clerk

cc: George P. Lynch
Honorable James E. Ryan
William L. Browers, Deputy Director
Mary Beth Burns